SHELL PIPE LINE CORP.

IBLA 82-1184 Decided November 30, 1982

Appeal from a decision by the Montrose, Colorado, District Office, Bureau of Land Management, to include modification and revision authority in a right-of-way grant.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way

   In granting a right-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771, where the duration of the grant exceeds 20 years, BLM must condition the grant upon the power to review the grant after 20 years and regular intervals thereafter not to exceed 10 years and to revise and modify its terms at that time as mandated by Departmental regulation, 43 CFR 2801.1-1(i).

2. Rules of Practice: Hearings

   Due process does not require notice and a right to be heard in every case where a party may be deprived of property so long as notice and an opportunity to be heard are provided before the action becomes final.

APPEARANCES: William G. Hougland, Esq., for appellant; Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Shell Pipe Line Corporation (Shell) appeals a right-of-way grant, C-26390A, issued on July 2, 1982, by the Montrose, Colorado, District Office, Bureau of Land Management (BLM), contending that a provision of the grant should be eliminated.

Appellant applied for a right-of-way to transport carbon dioxide (CO[2]) across southwestern Colorado under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976). BLM issued a grant on July 2, 1982, to expire on December 4, 2030. Section 1c of the grant reads: "The United States retains the right to review this right-of-way grant at the end of the twentieth year of its term and at regular intervals thereafter not to exceed ten years and to revise or modify its terms at those times." Appellant contends that section 1c should be deleted and the United States should not be permitted to revise or modify the right-of-way without the appellant's consent. It asserts that Title V of FLPMA does not give the Secretary the authority to modify or revise a grant unilaterally and unilateral modification or revision would violate due process rights unless an opportunity to comment is required before any change can be imposed.

[1] Section 1c is included in the grant pursuant to Department regulation, 43 CFR 2801.1-1(i), which reads: "Each grant issued for a term of 20 years or more shall contain a provision requiring periodic review of the grant at the end of the twentieth year and at regular intervals thereafter not to exceed 10 years." This regulation was issued under the power of the Secretary to promulgate regulations necessary to implement the policies of FLPMA. The relevant sections are:

> § 1764. General Requirements
>
> * * * * * * *
>
> (c) Applicability of regulations or stipulations
>
> Rights-of-way shall be granted, issued, or renewed pursuant to this subchapter under such regulations or stipulations, consistent with the provisions of this subchapter or any other applicable law, and shall also be subject to such terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination.
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> * * * * * * *
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> (e) Regulatory requirements for terms and conditions; revision and applicability of regulations
>
> The Secretary concerned shall issue regulations with respect to the terms and conditions that will be included in rights-of-way pursuant to section 1765 of this title.
>
> § 1765. Terms and conditions
>
> Each right-of-way shall contain-

> (a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; * * * and
>
> (b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

Appellant avers that the powers granted in Title V of FLPMA are not broad enough to include the power to modify or revise without the grantee's consent. It suggests that such a power would have been expressly delegated if Congress had intended it.

Legislative history records that Title V was intended to be a grant to the Secretary of "broad authority to make rights-of-way grants subject to specific terms and conditions." S. Rep. No. 583, 94th Cong., 1st Sess. 74 (1976) and H.R. Rep. No. 1163, 94th Cong., 2d Sess. 22 (1976), as found in Senate Comm. on Energy and Nat. Res., Legislative History of the Federal Land Policy and Management Act of 1976 (P.L. 94-579), S. Pub. No. 99, 95th Cong., 2d Sess. 139, 452 (1978). It includes a directive to prescribe terms and conditions to protect the environment, lives and property, and to manage public lands efficiently. 1976 U.S. Code Cong. & Ad. News 6174, 6196. Under 43 U.S.C. § 1765(b) (1976), each right-of-way shall contain such terms as the Secretary "deems necessary." Use of the words "deems necessary" indicates a grant of discretionary authority to the Secretary. In view of the broad nature of this discretionary authority, the Secretary appears well-empowered to prescribe conditions and terms that will protect and manage efficiently the public lands made subject thereto.

The applicable regulation, 43 CFR 2801.1-1(i), mandates that this lease be subject to periodic review as prescribed. Regulations have the force and effect of law and are binding on the Department. This Board has no authority to declare duly promulgated regulations invalid. Altex Oil Corp., 61 IBLA 270 (1982). Because the duration of the right-of-way extended beyond 20 years, BLM was bound by the regulation to include section 1c, or an equivalent, in the grant.

Appellant requests that the phrase "and to revise or modify its terms at those times" be deleted. The phrase appears in the provision in addition

to the language in the regulations. 43 CFR 2801.1-1(i) requires a "periodic review" of the grant. A "review" may require nothing more than an inspection or study thereof. However, "review" also means reconsideration with the possibilities of change or amendment. See Webster's Third New International Dictionary, 1944 (G.&C. Merriam Co., 1966 ed.); Roget's II The New Thesaurus, 785 (The American Heritage Dictionary 1980). To limit the scope of review to a mere inspection without the power to modify or revise would deprive the Secretary of the authority empowered in section 1765 to include in a grant such terms as are necessary to aid in the protection of federal interests and that of the public.

The right-of-way granted to appellant does not terminate until December 2030, almost 50 years from its effective date. This extended length grant appears to be in the interest of appellant which will put forth considerable effort and capital to construct and operate this pipeline. Although empowered with the discretionary authority to determine the length of the grant, the Secretary is also charged with a duty to manage and protect the public lands which the pipeline will traverse. See 43 U.S.C. §§ 1764, 1765 (1976). In light of the circumstances, the provision to review, revise, and modify the grant at the prescribed times appears to be the more favorable position for all interests involved. The alternative to this approach would be a shorter duration renewable grant (e.g., for 20 years or less) which would require appellant to exercise the renewal procedures allowing for modification of the grant's terms, conditions, and special stipulations. See 43 CFR 2803.6-3(a). Appellant would be in the same, if not worse, situation without the firm commitment that the grant would extend until the year 2030.

The problem with appellant's argument is that it misconceives the role the Department must pursue with respect to administering the laws relating to the management of public lands. While, admittedly, the issuance of an extended length right-of-way grant is, at times, in the public interest, this function cannot be viewed in isolation from other expressions by Congress of what is deemed beneficial to the public interest. There are other aspects of public interest which this Department has a duty to protect and foster, and FLPMA cannot be administered without regard to those other responsibilities. The regulations in 43 CFR Subpart 2800 represent the Department's efforts to balance the interests of right-of-way applicants with other interests requiring consideration by the Department. Grindstone Butte Project, 24 IBLA 49, 50 (1976), aff'd 638 F.2d 100 (9th Cir. 1981).

[2] Appellant is concerned about the lack of an express opportunity to comment on any proposed modification or revision. As noted above, it is clear that BLM may grant the right-of-way upon certain terms, conditions, and stipulations. However, those terms and conditions may not be inconsistent with or tend to unreasonably burden the right-of-way. See Donald R. Clark, 56 IBLA 167 (1981) and cases cited therein. An unreasonable or burdensome revision could be appealed to this Board. See 43 CFR 2804.1. This Board would review the administrative action to modify or revise and the arguments

appellant presents in opposition thereto. See 43 CFR Part 4, Subpart E. Due process does not require notice or the right to be heard prior to the initial decision in every situation where a party may be deprived of property so long as notice and an opportunity to be heard are provided before the action becomes final. Francis Skaw, 63 IBLA 235 (1982); One Hundred Gold Mining Co., 63 IBLA 56 (1982). An appeal to this Board would satisfy due process requirements. See H. B. Webb, 34 IBLA 362, 371 (1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the administrative decision to include section 1c as a provision of right-of-way, C-26390A, is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge